(3)

No. 01-1886

IN THE

Supreme Court of the United States

HELEN EDWARDS and CHRISTOPHER EDWARDS,

Petitioners,

v.

ACADIA REALTY TRUST, INC. and WELLS FARGO GUARD SERVICES, INC. OF FLORIDA,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF IN OPPOSITION FOR RESPONDENT WELLS FARGO GUARD SERVICES, INC. OF FLORIDA

NINA KOLE BROWN
Counsel of Record
CHRISTINE L. WELSTEAD
AKERMAN SENTERFITT
One Southeast Third Avenue
28th Floor
Miami, FL 33131-1704
(305) 374-5600

Attorneys for Respondent Wells Fargo Guard Services, Inc. of Florida

175274

COUNSEL PRESS
(800) 274-3321 • (800) 359-6159

BEST AVAILABLE COPY

1789

QUESTION PRESENTED

Whether the decision of the Court of Appeals for the Eleventh Circuit followed the decisions of this Court and was consistent with decisions of other Courts of Appeals when it ruled that the record evidence supported the trial court's entry of summary judgment in favor of Wells Fargo and against Helen and Christopher Edwards on their claim for race discrimination under 42 U.S.C. § 1981, and on their claim under 42 U.S.C. § 1983 for violation of their constitutional right to free speech.

CORPORATE DISCLOSURE STATEMENT

The Respondent herein, Wells Fargo Guard Services, Inc. of Florida was acquired by Burns International Security Services, Inc. of Florida, which was then acquired by Pinkerton's, Inc., a wholly owned subsidiary of Securitas AB, a company listed on the Stockholm Stock Exchange.

TABLE OF CONTENTS

	Page
Question Presented	i
Corporate Disclosure Statement	ii
Table of Contents	iii
Table of Cited Authorities	iv
Statement of the Case	1
Facts Material to the Question Presented	1
Reasons for Denying the Writ	6
A. The Decision Appealed Does Not Conflict With Prior Decisions Of This Court Or Other Courts Of Appeal	6
B. The Courts Below Properly Applied Existing Precedent To The Facts Presented	7
Conclusion	11

TABLE OF CITED AUTHORITIES

Page

Cases:

Ancata v. Prison Health Services, Inc., 769 F.2d 700 (11th Cir. 1985) 8

Arnold v. Board of Educ. of Escambia County Ala., 880 F.2d 305 (11th Cir. 1989) 8

Board of County Com'rs of Bryan County, Okl. v. Brown, 520 U.S. 397 (1997) 10

City of Canton, Ohio v. Harris, 489 U.S. 378 (1989) 10

Gold v. City of Miami, 151 F.3d 1346 (11th Cir. 1998) 9

Harvey v. Harvey, 949 F.2d 1127 (11th Cir. 1992) ... 7, 9

Monell v. Department of Social Servs., 436 U.S. 658 (1978) 9

Richardson v. McKnight, 117 S. Ct. 2100 (1997) .. 9

Sanders v. Sears, Roebuck & Co., 984 F.2d 972 (8th Cir. 1993) 9

Wade v. Byles, 83 F.3d 902 (7th Cir. 1996) 9

Cited Authorities

Page

Statutes:

42 U.S.C. § 1981 ..... i, 1, 7

42 U.S.C. § 1983 ..... i, 1, 7, 9

STATEMENT OF THE CASE

Petitioners, Helen and Christopher Edwards (the "Edwards" or "Petitioners") attempted to make a claim for civil rights violations based on their ejection from a privately owned and operated shopping center by a security guard employed by a private security company. Various claims for conspiracy to violate civil rights, and for violation of the right to petition and free association were dismissed by the United States District Court for the Middle District of Florida for failure to state a claim on which relief could be granted. After adequate time for discovery had passed, final summary judgment was entered in favor of Wells Fargo Guard Services, Inc. of Florida ("Wells Fargo") and co-Respondent Acadia Realty Trust, Inc. ("Acadia") on the Edwards' claims for intentional race discrimination under 42 U.S.C. § 1981 and for violation of the freedom of speech under 42 U.S.C. § 1983. The Edwards now appeal the Eleventh Circuit's affirmance of entry of final summary judgment and the order of dismissal by the trial court.

FACTS MATERIAL TO THE QUESTION PRESENTED

Searstown Mall (the "Mall") is a shopping center located in Titusville, Florida. (R,V4,101, ¶ 2)[1] It is privately owned and operated by an entity known as Searstown Mall Association, and formerly by a separate entity known as Acadia Realty Trust. (R,V5,141, pp.12 and 22-3) At all times

1. References to the Record of the Eleventh Circuit are indicated by "R" and include the volume number, document number, and page or paragraph number. References to materials included in the Appendix to Petition for Writ of Certiorari are indicated by "A."

material, Wells Fargo, a private security company, was hired to provide security guard services at the Mall. (R,V5, 141, pp. 46-47) At all times material, Wells Fargo maintained an anti-discrimination policy specifically prohibiting discrimination on the basis of race. (R,V4, 116, pp. 44-46) Wells Fargo provides education regarding the anti-discrimination policy to new employees at the time of hire, as well as periodic additional training to its security officers. (R,V4, 116, pp. 44-45; and V5, 141, p. 55)

Pursuant to the contract for services between Wells Fargo and the Mall, security guards assigned to Searstown Mall were directed to patrol the Mall and to enforce the posted rules of the Mall. (R,V5, 141, pp. 46-47, 83-84) One of the security guards employed by Wells Fargo and assigned to work at the Mall was Andrew Bankowski. (R,V4, 116, p. 35) Mr. Bankowski was familiar with, understood and followed Wells Fargo's anti-discrimination policy. (R,V4, 114, p. 46) While working at the Mall, Mr. Bankowski reported to Mall manager Deborah Hardy. (R,V4, 116, p. 35; V5, 141, pp. 10, 75-76, 83-85) Ms. Hardy remained continuously employed by the old owners of the Mall, Acadia Realty, and the new Mall owners, Searstown Mall Association. (R,V5, 141, pp. 12 and 26) The Mall has an anti-discrimination policy. (R,V4, 116, p. 51)

The Mall has written Rules and Regulations enforced by security guards. (R,V4, 120, pp. 23-24) Children were routinely escorted out of the Mall by security guards for the legitimate and non-discriminatory reasons of "safety and security". (R,V4, 116, pp. 23-24) The policy is racially neutral. (R,V4, 116, p. 22) Wells Fargo security officers assigned to the Searstown Mall enforced this racially neutral policy by questioning minors as to whether or not they were

accompanied by an adult, and by escorting unaccompanied minors to a designated location so that they could be picked up by their parents. (R, V4, 116, pp. 23-4)

On November 20, 1998, Helen and Christopher Edwards visited the Mall with their children. (R,V4, 108, p. 32) Helen Edwards is of American Indian and Irish ancestry. (R,V4, 112, p. 22) Christopher Edwards is Caucasian. On that night, Mr. Bankowski was providing guard services at the Mall. (R,V4, 116, p. 6) As part of his duties, Mr. Bankowski had actual or implied authority from the Mall owners to direct individuals to leave the premises. (R,V4, 161, p. 36; R,V5, 141, p. 51-52)

The Edwards observed unaccompanied minors being disruptive in the Mall. (R,V4, 112, pp. 190-192) A group of Caucasian minors asked the Edwards for some change. (R,V4, 112, p. 105, p. 59-60) Soliciting money is a violation of the Mall's written policies. (R,V4, 116, p. 44 and V5, 141, p. 251) The Edwards did not make any complaint about the behavior of the group of Caucasian minors. (R,V4, 112, p. 159) During the evening, Helen and Christopher Edwards had occasion to observe Mr. Bankowski interact with unaccompanied minors and in a "straightforward" tone of voice, ask what they were doing. (R, V4, 108, pp. 54-55; and V4, 112, p. 168) Mr. Edwards believes he observed this activity for approximately 10 to 15 minutes. (R,V4, 108, p. 65) Mrs. Edwards believes it was 25-30 minutes. (R,V4, 111, pp. 44, 54, 104) Petitioners did not observe a security guard approach the white children who were soliciting for money. (R,V4, 111, pp. 107 and 159) Mrs. Edwards admitted that the security guard may have escorted these white children out of the Mall that evening, however, she was not there to witness it. (R,V4, 112, pp. 107 and 160)

Also at the Mall that evening was Dr. Juan Perez. (R, V4, 122, p. 16) Dr. Perez is Hispanic. (R, V4, 122, p. 9) Dr. Perez was at the Mall for approximately 5-10 minutes that evening. (R,V4, 122, p. 62) He had occasion to see "some children, some teenagers", "some whites, [and] some blacks" at the Mall that evening. "Some of the children were loud. Some were more loud than others." (R,V4, 122, p. 59) Dr. Perez had occasion to witness a security guard tell a group of African American children he wanted "them to wait outside" the Mall. (R, V4, 122, p. 29) Dr. Perez did not have the opportunity to observe the security guards ask any other children to leave the Mall that evening. (R, V4, 122, p. 64)

At some point during the evening, Mrs. Edwards had a verbal disagreement with the security guard, Andrew Bankowski, while she was inside the Mall with her husband. (R,V4, 161, p. 8) As a result, Mr. Bankowski called the Titusville Police Department and requested that a trespass warning be issued to the Edwards because they were interfering with his duties as a security guard and yelling at him. (R,V4, 116, pp. 6, 10 and 14-15; V4, 126, Attachment 6; V5, 140, ¶ 5; and V5, 116, p. 21) The Edwards were never charged with any crime, and do not contend that they were arrested or held against their will. (R,V4, 111, pp. 78-9; V4, 109, pp. 125-7) The Edwards contend that they were wrongfully ejected and banished from the Mall. (R,V3, 57, ¶ 11)

Mrs. Edwards had visited the Searstown Mall on numerous occasions prior to November 20, 1998 and never had a problem with the security guards. (R, V4, 112, pp. 186 and 189) Mr. and Mrs. Edwards are not aware of the Searstown Mall ever discriminating against minorities or people who speak out on behalf of minorities prior to

November 20, 1998. (R,V4, 112, p. 127; V4, 109, pp. 208-9) Debora Hardy was unaware of any prior complaint of racial discrimination, racial harassment or related retaliation prior to the incident involving the Edwards at the Mall. (R,V5, 141, p. 57) Ms. Hardy had no prior complaints about Andrew Bankowski before the incident involving the Edwards, in fact, she sent a letter of appreciation to Wells Fargo because she was happy with his performance. (R,V5, 141, p. 78)

The trespass warning issued to the Edwards was maintained on the Mall premises by Ms. Hardy. (R,V5, 141, pp. 32, 51-52, and 79; and V4, 116, p. 36) Thereafter, the Edwards requested that the Mall management rescind the trespass warning so that they could be allowed to reenter the Mall. (R,V5, 141, pp. 8, 10, and 20-21) The Mall granted the Edwards' request, and the trespass warning was rescinded. (R,V5, 141, p. 7; V4, 101, ¶ 31)

The Edwards had occasion to return to the Searstown Mall with their children after the trespass warning was rescinded. (R,V4, 111, p. 30) While the Edwards were eating at a restaurant, their children were wandering unaccompanied throughout the Mall. (R,V4, 112, pp. 150 and 158-59) The Edwards unaccompanied children were asked by Mall security officers to "get back to where they belonged." (R,V4, 111, p. 30)

Helen Edwards has no knowledge of any conspiracy involving the Mall management. (R, V4, 112, p. 215) No one at the Mall ever asked Andrew Bankowski to treat patrons differently based on their race or color. (R,V4, 116, p. 54) The Titusville Police Department does not have any arrangements with the Searstown Mall or its security guards

regarding the trespass of individuals from the Mall. (R,V4, 126, Attachment 7, ¶ 6; V5, 140, ¶ 6; V5, 141, p. 76; and V4, 116, p. 32)

REASONS FOR DENYING THE WRIT

The Edwards' Petition for a Writ of Certiorari should be denied because the decision of the Eleventh Circuit Court of Appeals issued below is consistent with prior opinions of this Court and other U.S. Courts of Appeal decisions raising similar issues. The decisions below properly applied existing precedent to the facts presented.

A. THE DECISION APPEALED DOES NOT CONFLICT WITH PRIOR DECISIONS OF THIS COURT OR OTHER COURTS OF APPEAL

In the decision appealed, the Eleventh Circuit succinctly found "no reversible error" and affirmed the orders of the district court. (A-2) In the seventeen pages of argument presented by Petitioners, they fail to set forth a single decision of any court in direct conflict with this decision. This is not unexpected as the decision of the Eleventh Circuit does not cite any cases, but rather is a per curium affirmance based on review of the record presented.

Petitioners argument is a thinly veiled attempt to disguise their true complaint that the district court misapplied existing law to the facts Petitioners presented. In an attempt to display some conflict in law, Petitioners provide lengthy string cites. However, no pure conflict is ever established. Simply put, no such conflict exists.

B. THE COURTS BELOW PROPERLY APPLIED EXISTING PRECEDENT TO THE FACTS PRESENTED

The district court essentially determined that Petitioners did not suffer any deprivation of constitutionally guaranteed rights on November 20, 1998. The facts presented established that (1) Wells Fargo did not act as an arm of the state in removing the Edwards from Searstown Mall on November 20, 1998; and (2) Wells Fargo does not maintain a custom or policy of discriminating on the basis of race or taking action against those who oppose racial discrimination.

Petitioners did not come forward with evidence which a reasonable jury could consider and conclude that they suffered from intentional race-based discrimination. In removing the Edwards from private property, Wells Fargo enforced a racially neutral policy in a nondiscriminatory manner. Accordingly, judgment was properly entered against Petitioners on their claim brought pursuant to 42 U.S.C. § 1981.

Petitioners claims under 42 U.S.C. § 1983 failed because Petitioners failed to establish Wells Fargo was acting as an arm of the state when Petitioners were evicted from the Mall. *Harvey v. Harvey*, 949 F.2d 1127, 1130 (11th Cir. 1992).

All of the Petitioners' remaining claims were properly dismissed. Petitioners failed to allege that they were associating with minorities, a required element of alleging a claim for violation of their freedom of association. Petitioners claim for violation of equal protection rights was properly dismissed because they failed to allege that they were treated differently than any other individual who was trespassed from

the Mall for interfering in the security guards' duties. Petitioners failed to plead even the most basic factual scenario to sustain a clause of action against private parties claimed to be conspiring to commit purposeful discrimination on the basis of race. Accordingly, not only were Petitioners' remaining causes of action properly dismissed, but further leave to amend was properly denied.

The Edwards presented no evidence of anyone ever complaining about race based discrimination, whether to the Mall, the security guard company or even to the security officer himself. There was no evidence regarding any prior complaints of restricted free speech. The Edwards presented no evidence of prior constitutional violations or false arrests involving Florida's trespass after warning statute. Nonetheless, the Edwards asks this court to presume the offending custom or policy based on the 10 to 30 minutes the Edwards spent in the Mall on November 20, 1998.

The Edwards have submitted no proof as to a policy or custom of Wells Fargo to discriminate on the basis of race. Instead, the Edwards point to the actions of a single security guard and asked the court to infer a corporate-wide policy. The Edwards missed a crucial link. The trial court could not look at the actions of Bankowski alone and then infer a constitutional tort without evidence that the employee acted pursuant to a company policy or custom because then

> Liability for the independent actions of a[n . . .] employee would be based upon respondeat superior and thus not actionable against the [company] under § 1983.

Ancata v. Prison Health Services, Inc., 769 F.2d 700, 705, n.8 (11th Cir. 1985). *See also Arnold v. Board of Educ. of Escambia County Ala.*, 880 F.2d 305, 310 (11th Cir. 1989)

("The theory of respondeat superior is insufficient to impose liability on [local governmental body]." Citing *Monell v. Department of Social Servs.*, 436 U.S. 658, 691 (1978).

Petitioners suggest that the public policy considerations of requiring Petitioners show custom and policy before holding a public entity liable should be dispensed when a state role is taken over by a private corporation. Petitioners fail to explain what state role Wells Fargo took over when it entered into a contract with a private property owner to maintain secure private premises. *See Sanders v. Sears, Roebuck & Co.*, 984 F.2d 972 (8th Cir. 1993). Certainly, private security officers on private property are not state actors and have never been considered as such. *See Wade v. Byles*, 83 F.3d 902, 906 (7th Cir. 1996) (lobby security guard was not traditionally an exclusive state function, and thus guard was not state actor for purposes of § 1983 action).

Petitioners rely heavily on *Richardson v. McKnight*, 117 S. Ct. 2100 (1997), in support of their public policy argument for overturning *Harvey*. However, Petitioners fail to cite this Court to the description in *Richardson* with application to this particular appeal: "The case does not involve a private individual briefly associated with a government body." *Id.* at 2108. Petitioners' claims against Wells Fargo do not even meet *that* standard and the reasoning of *Richardson* does not apply.

In sum, the Edwards did not present any evidence from which a jury could find that the existence of a corporate policy or custom caused or was the moving force behind the violation of the Edwards' constitutional rights. *See Gold v. City of Miami*, 151 F.3d 1346 (11th Cir. 1998) (judgment as a matter of law properly entered for city based on lack of evidence of motivating policy or custom).

Petitioners cite *City of Canton, Ohio v. Harris*, 489 U.S. 378, 380 (1989), for the proposition that "a single or initial incident can provide evidence of a custom or policy, particularly if the Appellee is negligent about training and/or supervising to prevent the violation of rights." (Petition, p. 18) This Court has already recognized the narrowness with which the hypothetical single incident situation described in *City of Canton* should be read: To establish a "deliberate or conscious choice" or such "deliberate indifference," a plaintiff must present some evidence that the municipality knew of a need to train and/or supervise in a particular area and the municipality made a deliberate choice not to take any action. *See Board of County Com'rs of Bryan County, Okl. v. Brown*, 520 U.S. 397 (1997).

Under this precedent, Petitioners would still be required to establish that Wells Fargo, (1) was acting as an arm of the government; and (2) was on notice of a need to train or supervise in a particular area. Petitioners failed to present proof as to either requirement.

In reality, Petitioners seek to impermissibly inflate a single incident into establishing an offending company-wide custom and policy of a private corporation. This is little more than an veiled attempt to resuscitate their argument for *respondent superior* liability. Further, the Edwards point to no evidence that Wells Fargo is negligent in training its employees to prevent violation of civil rights.

CONCLUSION

Respondent Wells Fargo Guard Services, Inc., of Florida respectfully requests this honorable Court deny the Petition for a Writ of Certiorari.

Respectfully submitted,

NINA KOLE BROWN
Counsel of Record
CHRISTINE L. WELSTEAD
AKERMAN SENTERFITT
One Southeast Third Avenue
28th Floor
Miami, FL 33131-1704
(305) 374-5600

Attorneys for Respondent
Wells Fargo Guard Services, Inc.
of Florida